Oversea-Chinese Banking Corpn Ltd v Sindoma Realty Sdn Bhd and other applications

Sindoma Realty Sdn Bhd v Oversea-Chinese Banking Corpn Ltd & Ors

HIGH COURT (JOHOR BAHRU) – ORIGINATING SUMMONS NOS 31-1158 OF 1986, 31-1159 OF 1986, 31-1160 OF 1986 AND CIVIL SUIT NO 22-1098 OF 1987
ABU MANSOR J
5 OCTOBER 1988

Land Law – Order for sale – Application to set aside – Whether application should be by way of appeal – Whether court should set aside order for sale on ground that solicitors acting for chargee was not authorized to act

Civil Procedure – Interlocutory injunction – Application for – Injunction to restrain chargee from proceeding with order for sale given earlier by another High Court – Whether court has jurisdiction to restrain order of another High Court of co-ordinate jurisdiction – Whether issue is res judicata as allegations could and should have been raised in earlier foreclosure proceedings

Civil Procedure – Interlocutory injunction – Application for – Whether chargee can be compensated by damages – Where balance of convenience lay – Principles applicable

In this case, there were three originating summonses and one civil suit heard together. The applicants/plaintiff of the originating summonses and civil suit respectively were chargors of certain pieces of land and the respondents/defendant were the chargees. In the originating summonses, the applicants/chargors were seeking an order that the court set aside or stay the order for sale granted previously by the court to the respondents/chargees. In the civil suit, the plaintiff/chargor was applying for an interlocutory injunction against the defendant/chargee restraining them from proceeding with the order for sale pending the disposal of the suit. As the issues in the three originating summonses were similar, the court heard only Originating Summons No 1158 of 1986 and it was agreed by the parties that the court's decision will bind the other parties in the other two originating summonses. The facts of the case were as follows.

The chargor charged certain pieces of land to the chargee and on default by the chargor, the chargee applied for sale and the lands were ordered to be sold by public auction. However, when the order for sale was obtained after a few adjournments, the chargor's managing director absconded. When the shareholders of the chargor became aware of the order, they gave instructions to counsel to stop the sale or stay the order. Counsel for the chargor contended that the position of the matter was somewhat like a judgment in default since the chargor, though served, did not argue and as such, the court by means of another summons-in-chambers was entitled to set aside the order for sale and the application need not be proceeded by way of an appeal. Counsel for the chargee submitted, however, that the order for sale was under O 83 of the Rules of the High Court 1980 and it was not an in default order as the chargee applied for sale of the charged property. The chargor further contended that the solicitors acting for it during the application for the order for sale was not authorized to act as the chargor's directors instructed the solicitors without having obtained the authority of the chargor to do so.

In the plaintiff's application pertaining to Civil Suit No 1098 of 1987, the defendant contended that if the plaintiff could have raised all the allegations they are now raising in the earlier foreclosure proceedings leading to the order for sale, then raising them in the present application for an injunction is an abuse of the process of court. The defendant submitted that since the matters were not so raised, the matter was res judicata. The second contention of the defendant was that there was no provision in the Rules of the High Court allowing the court to restrain another order of the High Court. The third contention was that the balance of convenience lay in favour of the defendant proceeding with the sale and any damage suffered by the plaintiff can be ascertained and calculated in money and made good by the defendant.

Held, dismissing the chargor's and plaintiff's applications:

(1) It is quite clear from the order for sale that the chargor was served and represented by counsel. The order having been perfected, the applicant can only now proceed by way of an appeal. The application to set aside or stay the order for sale could therefore be dismissed.

(2) In the event that the court is in error with regard to the above finding, the court is still not able to find any good reason why the order for sale should be set aside. For the court to set aside that judgment for the reason that the solicitors acting for the respondent was not authorized to act, the reason being that the applicant's directors proceeded to instruct counsel without obtaining the authority of the applicant to do so, is to open the floodgates.

(3) As to the application for an interlocutory injunction, there is no jurisdiction of this court to restrain the order of another High Court of co-ordinate jurisdiction. Even if the court could give the order to restrain, the matter is res judicata as the matters raised could have been raised in the foreclosure proceedings and to raise them here is an abuse of the process of court.

(4) Granting an injunction is an exercise of a discretion based on judicial principles. If damages could be ascertained and damages to the applicant would be an adequate compensation, the injunction should be refused.

(5) The value of the lands charged which had been foreclosed can easily be ascertained at any given time and if the plaintiff wins in the suit action and the lands charged should not have been foreclosed, what has to be paid by the defendant/chargee in damages can be easily ascertained. Taking the application for injunction as a whole, the balance of convenience lies in refusing this application for injunction.

[*Editorial Note*: The chargors and the plaintiffs have appealed to the Supreme Court vide Civil Appeal Nos 477/88, 490/88, 492/88 and 491/88.]

Cases referred to

1 *United Malayan Banking Corpn Bhd* v *Syarikat Perumahan Lunas Sdn Bhd* [1988] 1 MLJ 546 (refd)
2 *Hock Hua Bank Bhd* v *Sahari bin Murid* [1981] 1 MLJ 143 (folld)
3 *United Overseas Bank Ltd* v *Chung Khiaw Bank Ltd* [1968] 2 MLJ 85 (refd)
4 *Lai Soon Cheong* v *Kien Loong Housing Development Sdn Bhd & Anor* [1986] 2 MLJ 369 (refd)
5 *Tan Suan Choo* v *Majlis Perbandaran Pulau Pinang* [1983] 1 MLJ 323 (refd)
6 *Lawrance* v *Lord Norreys* (1890) 15 App Cas 210 (refd)

7 *Lim Saw Bee* v *Development & Commercial Bank Bhd* (unreported) (refd)
8 *Yat Tung Investment Co Ltd* v *Dao Heng Bank Ltd & Anor* [1975] AC 581 (folld)
9 *Ram Sadhan Biswas* v *Mathura Mohan Hazra* (1924) 81 Indian Cases 3 (refd)
10 *Bina Satu Sdn Bhd* v *Tan Construction* [1988] 1 MLJ 533 (refd)
11 *American Cyanamid Co* v *Ethicon Ltd* [1975] AC 396 (folld)

Legislation referred to
Rules of the High Court 1980 O 28
Specific Relief Act s 54

Thara Singh Sidhu for the applicants.
DP Naban for the respondents.

Cur Adv Vult

Abu Mansor J: I heard arguments in open court in OS 1158/1986, 1159/86, 1160/86 and CS 1098/87 on 16 July 1988 at the end of which I reserved judgment. My judgment is as follows.

In each of the OS nos 1158-1160, the applicants are chargors and the respondents are the chargees of the pieces of land, the subject matter of the application. In each suit the applicant applied by way of summons-in-chambers in encl 30, encl 29 and encl 27 respectively that the court set aside and/or stay the order for sale granted by the court to the respondent chargee on the 2 September 1987 order ('the said order') encl 34. In CS 1098/87, encl 28, the applicant therein applies that the court grants an interlocutory injunction against the chargee restraining the chargee from proceeding with the said order pending the disposal of the suit 1098/87 filed to ask for certain declarations.

It was agreed by the parties that as the issues in OS 1158 of 1986 to OS 1160 of 1986 are similar, the court only hears OS 1158 of 1986 and the respondents consent that the decision in OS 1158 of 1986 will bind parties in OS 1159/86 and 1160/86. As the law applicable in CS 1098/87 is different, parties agreed that the applicant will submit after the submission in OS 1158/86. Reference to the applicant and respondent in OS 1158/1986 will equally apply to OS 1159/86 and 1160/86.

The facts of the case that led to the present applications are as follows. In the said order the Oversea-Chinese Banking Corp Ltd is the chargee. Sindoma Realty Sdn Bhd is the chargor.

On 2 May 1984, in order to secure repayment of $700,000, the chargor executed the first charge. Then the chargor executed a second charge on 10 April 1985 to secure repayment of a further sum of $200,000. As there was default by the chargor, the chargee demanded payment on 20 August 1986. The payment not forthcoming the chargee applied for sale and on 2 September 1987 the lands were ordered to be sold by public auction. It is this order for sale that the present applicant-chargor is applying to set aside or stayed. From hereon I refer to OCBC as 'chargee' and Sindoma Realty Sdn Bhd as 'chargor'.

The first issue which the court raised with applicants' counsel and which the respondents' counsel took up in reply is the power of the court to make the order sought for. This was the hurdle that the applicants must pass before he can even begin to argue the merits of the application.

Applicants' counsel commenced by saying his application is under O 19 r 9 and he then shifted from there and said he was proceeding under O 32 r 1(6) of the Rules of the High Court 1980.

Counsel said the application for sale of the property was served on the chargor whose managing director was Tai Boon Kuai. Tai had engaged counsel M/s Looi who asked for postponements. After a few adjournments, the chargees then obtained an order for sale on 2 September 1987 in all the three originating summonses which sales were to take effect on 6 December 1987. Thereafter, Tai and another director, the third defendant in CS 1098/87, absconded.

When the shareholders of the chargor became aware of the said order for sale they gave instructions to counsel to make an application to stop sale and/or stay. Counsel contended the position of the matter is somewhat like a judgment in default since the chargor, though served, did not argue. The position being such the counsel further contended that the court is entitled to set aside the order for sale. Counsel cited *United Malayan Banking Corpn Bhd* v *Syarikat Perumahan Lunas Sdn Bhd*[1] where my brother Edgar Joseph Jr J after hearing arguments on the point, held that an order made on an originating summons, even though duly served on a defendant who fails to enter an appearance and is absent at the hearing is, nevertheless, an ex parte order which can be set aside by means of another summons-in-chambers application and need not be proceeded on by way of an appeal. The chargor also urged the court to grant a stay as was done in *Hock Hua Bank Bhd* v *Sahari bin Murid*[2] where the order for sale was set aside.

For the chargee, however, counsel contended that the applicant chargor had not crossed the first hurdle. Counsel says the relevant Order that the applicant chargor proceeded on was O 28 of the Rules of the High Court 1980 relating to the hearing of an originating summons and not O 32 thereof which relates to summons-in-chambers. He submitted that the order for sale was under O 83 of the Rules of the High Court 1980, and it was not an in default order. The chargee applied for sale of the charged property. There were no suggestions of any irregularity committed by the chargee. The chargee

urged the court to dismiss the chargor's application in 1158/86-1160/86.

Though the applicant's counsel was unable to say under what Order he was applying, the chargee's counsel quite rightly conceded and the court held that the applicant is proceeding under O 28 of the Rules of the High Court. It is quite clear on a reading of that Order that I have the power to vary or set aside the order for sale if the order of 2 September 1987 was an ex parte order where the situation, he said, was similar to the position in *United Overseas Bank Ltd* v *Chung Khiaw Bank Ltd*[3] where Chua J said:

> It is clear then that a judge may proceed ex parte to hear an application where a party duly served fails to appear at the time appointed for the hearing ... It is the hearing which is ex parte and an order made on such a hearing is an ex parte order.

Mr Naban, counsel for the chargee, however, said that the position of the applicant is instead governed by *Hock Hua Bank Bhd* v *Sahari bin Murid*[2] as it is quite clear from the order of 2 September 1987 that the chargor was served and represented by counsel as in encl 34. The order having been perfected, the applicant can only now proceed by way of an appeal. I agree with the submission of the chargee's counsel and I hold myself bound by the authority of *Hock Hua Bank Bhd* v *Sahari bin Murid*[2] that the applicant should have proceeded by way of an appeal. The application to set aside and/or stay the order of 2 September 1987 could therefore be dismissed at that stage of the submission of the applicant's counsel.

In case I am in error in my judgment, I then proceeded to hear the submission of the applicant in substance. It would appear the only ground advanced by the applicant in wanting the said order set aside was that the chargor's directors proceeded to instruct counsel M/s AL Looi without having obtained the authority of the chargor to do so.

At the end of his submission for a stay, applicant's counsel said he would be happy if the applicant could have an order for a stay. I formed the impression that the applicant was more relying on his application for a stay. They want a stay as they have filed CS 1098/87 praying for all the charges to be declared null and void. The trial is still to come and he urged the court to allow them an opportunity to prove the allegations.

The allegations are as set out in the amended statement of claim in CS 1098/87 encl 9. The applicant Sindoma is the plaintiff. The defendant is the Oversea-Chinese Banking Corporation and the directors were made up of father and son who have absconded. Applicant's counsel says that their claim must have some merits else the defendant would not have filed their defence and the defendant could have moved to have the civil suit struck out but did not do so.

The substance of the plaintiff's allegation in the amended statement of claim was as follows. The plaintiff deals mainly in palm oil and has no authority to deal in rubber. Rubber was dealt with by Lam Seng Traders – a family company whose directors are the same second and third defendants in CS 1098/87. The court was referred to encl 29 exh 5A to 5N where some $700,000 worth of cheques were transferred from the Sindoma account in OCBC to the account of Lam Seng Traders. The court was also referred to p 17 of encl 29 where some $592,000 was on different dates transferred from the Sindoma account in OCBC to Lam Seng Traders even before the charges were registered on 2 May 1984 to secure repayments of these amounts. The loans though raised for Sindoma were instead channelled for the family company to enable Lam Seng to deal in rubber since Sindoma had no licence to deal in rubber. The applicant, as authority, cited *Lai Soon Cheong* v *Kien Loong Housing Development Sdn Bhd & Anor*,[4] where the Supreme Court found for the purchaser of the lot who had paid substantially the purchase price and who alleged fraud having been perpetrated against him by the first and second respondents and he therefore sought to defeat the indefeasible title of the second respondent on that ground. Counsel submitted a stay should also be given to the applicant as there is weighty evidence to be gone through.

On his prayer for an injunction, the applicant's counsel urged the court to consider *Tan Suan Choo* v *Majlis Perbandaran Pulau Pinang*[5] where it was held that there is no bar to his being granted an order for a temporary injunction.

For the respondent chargee, in his reply, counsel said that the case of *United Malayan Banking Corpn Bhd* v *Syarikat Perumahan Lunas Sdn Bhd*[1] was of no application since it clearly referred to an ex parte order and he contended that the present order dated 2 September 1987, encl 34, was not such an order. He was of the view that the case of *Hock Hua Bank Bhd* v *Sahari bin Murid*[2] could be relevant as it was a case where it was decided after hearing all parties, and similar to the present matter there was no appeal. Following *Hock Hua Bank's* case[2] counsel contended that the court was functus officio with no more powers to vary the earlier order. Counsel urged that OS 1158-1160 therefore had fatal flaws and had to be dismissed. In the matter of the *Hock Hua Bank's* case,[2] counsel for the chargor was described by the Federal Court as fortunate that the counsel for the chargee bank had agreed to the stay whereas in the present case counsel for the chargee had strict instruction not to concede to stay. Counsel also sought to distinguish *Lai Soon Cheong* v *Kien Loong Housing Development Sdn Bhd & Anor*[4] where the order of stay granted was not to the sale of the whole land but the injunction granted was to a purchaser of one of the lots.

Counsel also referred to the jurisdiction of the court in granting a stay. He submitted that the Supreme Court decision is clear. He referred the court to the *Supreme Court Practice* (1982) p 3345, para 3346 and drew the court's attention to the case of *Lawrance* v *Lord Norreys*[6] which stated that the powers should be exercised sparingly. In the present case the order for sale is already granted. The applicant wants a stay of the order of 2 September 1987. He submitted no stay can be had in 1158-1160 as everything has come to an end by the order.

As regards the application for an injunction in CS 1098/87 against the chargee where the order for sale had been granted, counsel urged the court to ask itself the question if the applicant could have raised all the allegations they are now raising in CS 1098/87 in the foreclosure proceedings leading to the order dated 2 September 1987, then raising them in the present application for an injunction is an abuse of the process. He cited *Lim Saw Bee* v *Development & Commercial Bank Bhd*[7] (unreported) where a subsequent action to have an order of sale set aside was struck out as the matters in the subsequent action should and could have been raised in the foreclosure proceeding. Since the matters were not so raised the matter was res judicata. Counsel cited *Yat Tung Investment Co Ltd* v *Dao Heng Bank Ltd & Anor.*[8] Counsel also raised the question of the jurisdiction of the court in granting the injunction sought in CS 1098/87 by reason of s 54 of the Specific Relief Act 1950 where an injunction can only be granted to prevent multiplicity of suits which was not the case in the present matter before us. Secondly, the injunction is an order sought to be directed against the order of a High Court and not an order of a subordinate court. Counsel submitted that the injunction sought ought not to be granted. Counsel also urged the court to distinguish the case of *Tan Suan Choo* v *Majlis Perbandaran Pulau Pinang*[5] where the order sought was to restrain the Majlis Perbandaran but not the restraining of a court order.

In this regard counsel submitted that there is no provision in the High Court Rules allowing a restraint of a court order unlike the Indian provision which has such a procedure. He cited *Code of Civil Procedure – Sarkar*, 8th Ed, where the practice is available in India, not in our procedure. Counsel cited *Ram Sadhan Biswas* v *Mathura Mohan Hazra*[9] at p 6. As for the case *Bina Satu Sdn Bhd* v *Tan Construction*[10] counsel sought to distinguish it with the present application in that in *Bina Satu*[10] the injunction sought was not to restrain a court but the litigant, Tan Construction.

Counsel also urged the court to consider the facts known to the chargee as set out in the affidavit of Chow Kwai Hin affirmed on 2 February 1988, encl 21, in CS 1098/87. Counsel submitted that it cannot be the function and the burden of the chargee to be an investigative agent to ascertain the business of the customer, especially when the objects of customers like the chargor are so wide as to be able to conduct all businesses. The chargee can only act according to the instructions of client especially if such is signed by known signatories or else the chargee would be in breach of contract. In this instance, the applicant chargor is not alleging that the charges were signed by unauthorized persons.

Counsel for the chargor also submitted that the injunction, if it is to be had, must be given on established principles in *American Cyanamid Co.*[11] Even assuming that the applicant chargor proceeds against the chargee the chargee (OCBC) is an established bank. The balance of convenience lies in favour of the chargee proceeding with the sale and any damage suffered by the chargor can be ascertained and calculated in money and made good by the chargee.

There is also the fact that, counsel submitted, the charges created are indefeasible under s 340 of the National Land Code. The allegation that the charge was void because money was used wrongfully could not result in the charges becoming defeasible. The creation of the charge was authorized by the board of the chargor. No allegation was made that the registration was a forgery. Counsel submitted that the chargor may have a claim against the directors but on the facts, he submitted, there is no case against the chargee to have the charge declared a nullity.

The clear and distinct issues that fall for the court's decision, after listening to arguments, are whether there are present circumstances on which the court may exercise its discretion to set aside the order for sale. If this answer is in the negative, are there circumstances that exist that the court may give an injunction to restrain the order of sale?

On the application to have the order for sale set aside, the only reason given is that the solicitors acting for the respondent chargor was not authorized to act. Other than that it is not suggested that the judgment was other than a regular judgment. I agree with the submission of the chargee's counsel that for the court to set aside that judgment for that reason is to open the floodgates. That being the case, the court cannot find any good reason why it should set aside the order for sale of 2 September 1987. I therefore dismiss that application to have the order of 2 September 1987 set aside or stayed with costs to the chargee to be taxed.

As regards the application for an injunction in CS 1098/87 the matter had to be separately considered. Quite rightly, as submitted by chargee's counsel, the matter is governed by a different set of principles as stated in the case *American Cyanamid Co* v *Ethicon Ltd.*[11] The injunction is an exercise of a discretion based on

judicial principles. Where does the balance of convenience lie? Is it in granting or refusing it? If damages can be ascertained then injunction should also be refused. Would damages of the applicant be adequate if the injunction is refused. The value of the lands charged which had been foreclosed can easily be ascertained at any given time and if the plaintiff wins in CS 1098/87 and the lands charged should not have been foreclosed, what has to be paid by the chargee in damages can be easily ascertained.

The injunction to my mind cannot also be granted for another very good reason. I agree with the submission of counsel for the chargee that there is no jurisdiction of this court to restrain the order of another High Court of co-ordinate jurisdiction (see *Bina Satu Sdn Bhd* v *Tan Construction*[10]).

Even if the court could give the order to restrain, the court concludes that this matter is res judicata in the broad sense as the matters raised could have been raised in the foreclosure proceedings. I find the authority in *Yat Tung Investment Co Ltd* v *Dao Heng Bank Ltd & Anor*[8] binding on this court where it was held that matters which could have been raised earlier should have been raised in the earlier proceeding and to raise again here is an abuse of the process of the court.

Taking the application for injunction as a whole, the balance of convenience lies in refusing this application for injunction. For the reasons given I therefore refuse it. Application for injunction is also dismissed with costs to be taxed.

Application dismissed.

Solicitors: *Thara Singh Sidhu*; *Skrine & Co.*

Reported by *Ng Sheau Jiuan*

Bank Bumiputra Malaysia Bhd v Mahmud bin Haji Mohamed Din (Datin Hajjah Salma bte Md Jamin, Intervener)

HIGH COURT (IPOH) – ORIGINATING SUMMONS NO 31-1642-86
PEH SWEE CHIN J
4 OCTOBER 1988

Land Law – Priority of interests under National Land Code 1965 – Intervener purchased land from chargor before chargee's interest was registered – Whether intervener's interest being earlier in time was stronger in law – National Land Code 1965, s 340

Land Law – Statutory notice of default under National Land Code stated breach continued for seven days – Breach in fact continued for only six days – Whether irregularity affected root of chargee's rights – National Land Code 1965, s 254 Form 16D

The plaintiff was a chargee of five pieces of land and had applied to the court for an order, inter alia, that the land be sold by public auction. Before the hearing, the intervener applied and was allowed to intervene in the proceedings on the ground that she was a purchaser of one of the five pieces of land. The intervener raised two grounds of objections: (a) the statutory notice of default in form 16D issued under s 254 of the National Land Code 1965 was defective because though it mentioned that the breach of a provision of the charge had continued for a period of seven days prior to the date of the said statutory notice of default, such breach in fact had continued not for a full seven days but for a period of about six days; (b) the sale agreement between the defendant chargor and intervener was signed on 19 June 1980 while the new charge was created and registered by the chargee in 1983. As such, the intervener's interest, being earlier in time, was stronger in law.

Held, dismissing the intervener's objections:

(1) The money lent in the instant case was expressly made repayable on demand. The statutory notice of default must have been enacted with the object of giving sufficient notice to a chargor before an order of sale by public auction is applied for. Such an object was patently complied with in regard to the sum which was repayable on mere demand on the facts in this case. The minor irregularity complained of did not go to the root of the chargee's rights.

(2) The chargee, being a registered chargee, had attained an indefeasible title against the world save for a few exceptions as set out in s 340 of the National Land Code. As the exceptions did not apply in the instant case, the supervening title would defeat a prior equitable right or interest.

[*Editorial Note*: The intervener has appealed to the Supreme Court vide Civil Appeal No 362 of 1988.]

Cases referred to

1 *Jacob* v *Overseas Chinese Banking Corporation* [1974] 2 MLJ 161 (folld)
2 *Tan Kai Kok* v *Thor Teik Seng* [1935] MLJ 91 (refd)
3 *Ong Chat Pang* v *Valliappa Chettiar* [1971] 1 MLJ 224 (refd)

Legislation referred to

Interpretation Act 1967 s 26
National Land Code 1965 ss 254, 340, Form 16D

Lalchand Nathermal for the plaintiff.
Mohd Shahrom Mohamad for the defendant.
Hira Singh for the intervener.

Cur Adv Vult